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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 998

THE NILES FIRE BRICK COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 948–956) is reported in 124 F. (2d) 366. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 36–114) are reported in 18 N. L. R. B. 883.

JURISDICTION

The order of the court below (R. 947) was entered on December 5, 1941. The petition for a writ

of certiorari was filed on March 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

After hearing but before determination of a representation proceeding under Section 9 of the Act, the Board instituted an unfair labor practice proceeding under Section 10 and consolidated the two proceedings, in both of which petitioner was a party and participated. The record in the representation proceeding was made a part of the record in the consolidated case and in its decision holding that petitioner had engaged in unfair labor practices the Board based its jurisdictional findings upon stipulated and other evidence which had been adduced at the hearing in the representation proceeding. There was no allegation or showing that this evidence was inaccurate. The questions are:

1. Whether in the circumstances the Board erred in consolidating the proceedings and in using the jurisdictional evidence adduced in the representation proceeding as evidence in the unfair labor practice proceeding, and if so whether the error was prejudicial.

2. Whether the Board's findings of unfair labor practices are supported by substantial evidence.

A question urged in the petition but upon which no provision of the Board's order is dependent in view of petitioner's other unfair labor practices is whether petitioner is responsible for the anti-union statements and conduct of one of its foremen.

STATUTE AND RULES INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set out in the Appendix, *infra,* pp. 17–20.

STATEMENT

Upon a petition filed by United Brick Workers' L. I. U. No. 198 (a labor organization affiliated with the C. I. O. and herein called the Union) requesting an investigation and certification of representatives, the Board on October 4, 1937, pursuant to Section 9 (c) of the Act, ordered an investigation (R. 36–37). Notice of hearing was served by the Board upon petitioner and other interested parties, and a hearing was held before a trial examiner of the Board on November 1 and 2, 1937. Petitioner appeared, was represented by counsel, and participated in the hearing with full opportunity to examine and cross-examine witnesses and to introduce other evidence bearing on the issues (R. 37, 115–141). During the hearing petitioner stipulated (R. 116–117) and its vice president testified (R. 120–141) as to facts pertinent to the question of the Board's jurisdiction (R. 118–119).

After the close of the hearing but prior to any decision in the representation proceeding, the Union on November 15, 1937, filed charges that petitioner had committed various unfair labor practices (R. 13, 37–38). On January 14, 1938, the Board, pursuant to Article II, Section 37 (b), of its Rules and Regulations (*infra,* p. 19), ordered that the representation proceeding and the unfair labor practice proceeding be consolidated for all purposes (R. 14, 38).

Thereafter the Board issued a complaint against petitioner alleging the commission of various unfair labor practices (R. 23–29, 38). A hearing thereon was held before a trial examiner of the Board from March 10 through 17, 1938 (R. 39, 142). Petitioner's objections to the order of consolidation (R. 142–143) were overruled by the trial examiner (R. 144) and his ruling was thereafter affirmed by the Board (R. 39). The record in the representation case was introduced by the Board over petitioner's objection and made part of the record in the consolidated case (R. 146–147). The trial examiner denied leave to petitioner to introduce jurisdictional evidence, which counsel for petitioner stated was in amplification and not in contradiction of that introduced in the representation proceeding (R. 540–543). However, the examiner allowed petitioner to make an offer of proof (R. 543–544) and in its decision the Board accepted as true the matters set forth in the offer (R. 40).

The examiner also granted petitioner's request for permission to make an additional offer of proof on the question of jurisdiction later in the hearing (R. 544). Petitioner did not avail itself of this opportunity.

On December 28, 1939, the Board issued its findings of fact, conclusions of law, and order (R. 42–114). The Board found that 60 percent of petitioner's annual purchases of raw materials costing $275,000 and 10 percent of its sales of finished products which total $600,000 are shipped in interstate commerce (R. 42–43, 106, 110; R. 116–117).[1] Petitioner does not dispute the sufficiency of the evidence adduced in the representation proceeding to support these findings, if the evidence properly was incorporated in the record used by the Board.

With respect to the unfair labor practices, the facts as found by the Board and shown by the evidence may be summarized as follows:

Soon after a C. I. O. affiliate began to organize petitioner's employees in the spring of 1937, petitioner shut down its plant and, in order to cause the employees to believe that they were discharged because of their union activities, took the unprecedented action of paying them off in advance and taking their identification badges (R. 43–44, 45; 152–153, 304–305, 345, 873). Within a few

[1] The references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

days, however, after a C. I. O. committee protested this action, operations were resumed (R. 44–45; 153–154, 305, 873).

A few weeks later a negotiating committee of the Union, accompanied by a Union organizer, called on General Manager Sheehan and presented a draft of a proposed contract (R. 45–46; 203, 306). Sheehan advised one of the committee members that the committee should return without the organizer, stating that Vice President Clingan "[didn't] want to see" him (R. 46; 203). Thereafter, Clingan informed the committee members that he would not talk to any "C. I. O. organizer" (R. 46; 307) and exhorted them to "forget the C. I. O." and form "some kind of a union here with no outside connections. I will consider going along with that" (R. 46; 203, 307). When the Union later made two further attempts to bargain with petitioner, Sheehan refused to discuss the Union's proposed contract and advised the committee that petitioner would not sign the contract despite the Union's offer to eliminate any provisions objectionable to petitioner or even to let petitioner "write up [its] own contract" (R. 47; 610–612, 307–308). During this same period, petitioner's labor foreman Gagany, told the Union's president that petitioner "will go along with you better" if "you form a company union, an independent union" (R. 47; 309, 350). The evening of its final meeting with petitioner, the Union went on strike; a substantial factor in causing the strike

was petitioner's foregoing display of hostility toward the Union and encouragement of an inside union, acts which the Board found to be in violation of Section 8 (1) of the Act (R. 47–48, 65; 156–157, 308–309).

During the strike, a son-in-law of General Manager Sheehan, James Matteo (R. 48, 54; 168), because he was aware of petitioner's desire to negotiate with an inside union (R. 54–55, 57; 794–795, 796–797), with Tackett, another employee, commenced to solicit the striking employees, including the Union's president, to form such an organization and return to work (R. 48–49; 201, 311, 862). Vice-President Clingan then personally assured Matteo that he would deal with an inside union (R. 49; 792–793). When Matteo and some Union committeemen proposed, however, that petitioner enter into a contract with an inside union containing a reservation that the contract could be turned over to the Union at any time, the proposal was rejected (R. 49; 169–170). And although petitioner met with Matteo several times, it refused to confer with officials of the Union (R. 49; 171–172, 313).

When the strike was ended by the Union on August 1, 1937 (R. 49; 157), petitioner refused to reinstate some Union members (R. 49; 172, 313). General Manager Sheehan declined to discuss their reinstatement with a Union committee, stating that

he would talk to each man only "as an individual" (R. 49–50; 172–173, 354–355, 370).[2] A conciliator of the United States Department of Labor was called in by the Union and several conferences were held with petitioner (R. 50; 161–166, 189, 313–315), one of which broke up when Vice-President Clingan referred to some of the Union committee members as "rats and nuisances to the Company" (R. 50; 166). The negotiations concluded with the rehiring of a group of Union men on August 18 and some others on September 1 (R. 50; 164–165, 236, 317, 390).

After the termination of the strike, Matteo and Tackett printed blank membership cards and solicited for an unaffiliated union, Brick Workers' Independent Organization, herein called the Independent (R. 51; 793–794, 857–858). Clingan assured them, once more, that he "would deal" with the Independent (R. 51; 794–795). Thereafter Matteo and Tackett, together with another son-in-law of General Manager Sheehan, James McCormick (R. 52; 188), circulated a petition opposing an election sought by the Union in the Board representation proceeding then pending (R. 51–52; 188, 267–268, 460, 504–505, 795, 814–815, 939–943. Following the Board hearing therein in November

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[2] Later Sheehan likewise stated to a Union committeeman. "You know you can't get anywhere by coming in here as a group. If you talk for yourself, you will get somewhere" (R. 50–51; 358–359).

1937, various employees including Matteo, Labor Foreman Gagany, and Aubrey Sheehan, who was a supervisory employee and the son of General Manager Sheehan, extensively solicited for the Independent in the plant during working hours, in some cases threatening loss of employment for failure to join (R. 52, 56–60; 237–238, 250–251, 268–269, 349–350, 360, 422–423, 432, 454–455, 485, 835, 849, 852–853).[3]

Petitioner thereafter lent further aid to the Independent by discontinuing operations a half hour early to permit attendance at its organization meeting (R. 52; 486–489); when a second Independent meeting was held, Foreman Gagany instructed men then working under him to attend, without loss of pay (R. 53; 239–240). In contrast, petitioner during this period discriminatorily discharged various leaders and members of the Union (R. 61; *infra,* pp. 10–12). The Independent collected no dues (R. 53; 483, 485, 823) and made no effort to bargain with petitioner (R. 53; 826).

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[3] The Board found that petitioner was responsible for the activities of Gagany, Matteo, and Aubrey Sheehan (R. 54–61) because they were inspired by and emulated the example of Vice-President Clingan and General Manager Sheehan in opposing the Union and favoring an inside organization; because the two men related to the General Manager were permitted to use their relationship to coerce employees; because Gagany, as Labor Foreman, was admittedly a supervisor in charge of a department (R. 60; 591–592); and because Aubrey Sheehan was also a supervisor with authority to recommend discharge (R. 60; 852–853).

The Board concluded that petitioner, by various of its actions above set forth, interfered with its employees' rights of self-organization in violation of Section 8 (1) of the Act, and that it dominated, interfered with, and supported the Independent in violation of Section 8 (1) and (2) of the Act (R. 61–62, 109–110).

The Board found further that petitioner discriminatorily delayed reinstating 13 employees after the strike (R. 68, 71, 72, 75, 78, 81, 83, 84, 87, 89, 91, 93, 94); that it thereafter discriminatorily demoted one of these employees (R. 70) and discriminated against two others in distributing work (R. 76, 81); and, finally, that it discriminatorily discharged nine employees (R. 70, 71, 73, 76, 79, 81, 83, 94, 96), including seven who had suffered previous discrimination (*supra*). All of the employees were members of the Union and had participated in the strike;[4] five of them were either Union officials or committeemen.[5] Many of those selected for discrimination had been singled out for abuse or had been threatened with discrimi-

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[4] Yarwood (R. 66; 150, 157). Bacos (R. 70; 458). Nacco (R. 71; 253). Evans (R. 73; 491). Miller (R. 76; 430). J. Villio (R. 79; 266). Estes (R. 81; 389). Toth (R. 83; 235). Whitt (R. 85; 273). Liberatore (R. 88; 302). Mathews (R. 90; 440). A. Villio (R. 92; 369–370). Sabo (R. 93; 353). Nardo (R. 94; 466). Infante (R. 94; 419).

[5] Yarwood (R. 66; 151, 315). Whitt (R. 85; 273, 315). Liberatore (R. 88; 302). A. Villio (R. 92; 315, 370). Sabo (R. 93; 315, 354).

nation because of their Union activities;[6] or had refused to join the Independent or to sign the petition opposing the election;[7] or had testified for the Union or had refused to agree not to testify.[8]

Although petitioner offered various explanations for its conduct, the Board found that the proffered reasons were either groundless or were not actually the motivating cause. Thus, the Board found, contrary to petitioner's claims, that certain of the employees had applied for reinstatement;[9] that some of the employees were refused reinstatement, discharged, or otherwise discriminated against, in violation of petitioner's established seniority practice;[10] that the alleged

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[6] Yarwood (R. 68, 69; 165–166). Evans (R. 73, 74; 494, 505). Miller (R. 76; 429–430). J. Villio (R. 80; 268, 269). Whitt (R. 86; 165–166). Sabo (R. 93–94; 359). Infante (R. 96; 454–455).

[7] Evans (R. 74; 504–505). Miller (R. 76; 432). J. Villio (R. 80; 268–269). Nardo (R. 94; 466–467). Infante (R. 95; 423).

[8] Yarwood (R. 66, 69; 185). Evans (R. 74; 502).

[9] Yarwood (R. 67–68; 229). Bacos (R. 70; 458–459). Evans (R. 75; 491–492). Miller (R. 77; 436–437). Sabo (R. 93; 354–355).

[10] R. 65; 642, 690, 711, 772. Yarwood (R. 68, 69–70; Bd. Exh. 3). Bacos (R. 71; Bd. Exh. 3). Nacco (R. 72–73; Bd. Exh. 3). Evans (R. 75; Bd. Exh. 3). Miller (R. 79; Bd. Exh. 3). J. Villio (R. 80–81; Bd. Exh. 3). Estes (R. 83; Bd. Exh. 3). Whitt (R. 86; Bd. Exh. 3). Mathews (R. 91; 442, 451–452, Bd. Exh. 3). A. Villio (R. 92; 378–379). Nardo (R. 94; Bd. Exh. 3). Infante (R. 95–96; 425–427, Bd. Exh. 3). Board Exhibit 3 is not printed, but is on file in the Court.

incompetency or disability of some employees was not the reason for the discrimination against them;[11] that petitioner offered conflicting or shifting reasons for its discrimination;[12] and that petitioner accorded unequal treatment to Union and non-union employees in the same position.[13]

The Board found and concluded that petitioner discriminated against these employees because of their Union membership and activities, in violation of Section 8 (1) and (3) of the Act (R. 104, 109–110, 114). Petitioner's discriminatory demotion and subsequent discharge of Yarwood were found to have been motivated by the additional reason that he had testified in behalf of the Union, hence to have been in violation of Section 8 (4) also (R. 66–70, 104, 110; 185).

The Board's order required petitioner to cease and desist from its unfair labor practices, to disestablish the Independent, to reinstate and make whole the nine employees discriminatorily discharged, to make whole the six other employees discriminated against, and to post appropriate notices (R. 111–114). The Board dismissed the complaint insofar as it alleged certain other unfair labor practices (R. 113–114). It dismissed without

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[11] Yarwood (R. 68–69; 173, 685–686, 695). Evans (R. 75; 495–496). Miller (R. 77–78; 428). Liberatore (R. 89; 645–646, 316).

[12] Bacos (R. 70–71; 654, 754). Estes (R. 82; 392, 403–404). Toth (R. 84; 236, 403–404).

[13] Estes (R. 81–82; 403–404, 678). Toth (R. 84; 403–404, 678).

prejudice the Union's petition for an investigation and certification of representatives (R. 114).

On January 6, 1941, the Board filed in the court below a petition for enforcement (R. 1–8), and on December 5, 1941, the court handed down its opinion (R. 948–956) and entered its order (R. 947) affirming the order of the Board.

ARGUMENT

The decision of the court below is correct. No conflict or other reason for further review of the Board's order is presented.

1. Petitioner contends (Pet. 15–23) that the consolidation of the unfair labor practice proceeding with the representation proceeding was unauthorized under the Act and together with the Board's reliance upon the jurisdictional evidence adduced in the latter proceeding constituted prejudicial error and a denial of due process of law. The trial examiner's exclusion of further evidence on the question of jurisdiction is assailed on similar grounds.

The consolidation was within the express terms of Article II, Section 37 (b) of the Board's rules and regulations (Appendix, *infra,* p. 19), which provided that at any time after the filing of a charge of unfair labor practices the Board, if it deemed it necessary to effectuate the purposes of the Act, might order that "such charge, and any proceeding which may have been instituted in respect thereto * * * be consolidated for the

purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region."[14] This provision is plainly valid under the rule-making power granted to the Board by Section 6 (a) of the Act (Appendix, *infra*, p. 17). See *Warehousemen's Union, etc.* v. *National Labor Relations Board*, 121 F. (2d) 84, 94 (App. D. C.), certiorari denied October 27, 1941, Nos. 627, 628, this Term. Cf. *Boske* v. *Comingore*, 177 U. S. 459, 470. The argument that Section 9 (c) of the Act in providing that a hearing in a representation proceeding may be held in conjunction with an unfair labor practice proceeding excludes power in the board to consolidate the proceedings once there has been a hearing in the representation case is without basis in the terms of the statute or in the legislative history and is intrinsically unreasonable. Cf. *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 122. The Act is not to be construed narrowly to deny to the Board, or to the courts, familiar procedural powers not specifically granted by Congress but appropriate to orderly administration and not intended to be withheld. Cf. *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364; *Goldsmith* v. *Board of Tax Appeals, supra.*

Since the additional evidence which petitioner sought to adduce on the question of jurisdiction was conceded to be in amplification and not in

[14] Both proceedings in this case were instituted at Cleveland, Ohio, in the Eighth Region of the Board (R. 36, 37).

contradiction of the evidence introduced in the representation proceeding and since the trial examiner admitted and the Board credited the only offer of proof made by petitioner (*supra,* pp. 4–5), the examiner's ruling excluding the evidence, if at all erroneous, was in no way prejudicial.

2. Petitioner urges (Pet. 23–24) that the Board erred in holding it responsible for the anti-Union and pro-Independent statements and other conduct of Foreman Gagany. The court below apparently sustained the Board on this issue (R. 954–955). The validity of the order, however, was not dependent upon such a holding since the evidence summarized in the Statement (*supra,* pp. 5–12) establishes that, entirely apart from the statements and acts of Gagany, petitioner violated Section 8 (1) and (2) of the Act.

In any event, petitioner's contention is without merit. Gagany was a foreman in charge of a department (R. 60; 591–592) and thus occupied a supervisory status sufficient under the decisions of this Court to charge petitioner for his anti-union activities whether or not they were authorized, especially since his conduct was in accord with the example set by petitioner's highest officials. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 80–81; *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 518–521; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 598–599. The cir-

cuit courts of appeals decisions asserted (Pet. 10) to be in conflict with that of the court below necessarily depended upon the particular facts presented and in none of the cases did it appear that the supervisor's anti-union conduct emulated the example of the employer's highest ranking officials.

3. Finally, petitioner contends (Pet. 24–57) that there is no substantial evidence to support the Board's findings of unfair labor practices. The evidence analyzed in the Board's decision and hereinbefore summarized (*supra*, pp. 5–12), is, however, clearly substantial. The court below reviewed the evidence in its opinion and there is no occasion for this Court to consider it further.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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